Pretrial Detainment: The Fruitless Search for the Presumption of Innocence

I. Introduction

The "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[1] This basic principle, which has prevailed within our judicial system since its beginning, is grounded in the fundamental and humane maxims of Roman law.[2] Judicial adherence to the presumption of innoncence had been particularly valuable for pretrial detainees[3] who were imprisoned and awaiting trial.[4] Until recently, courts held that restrictions imposed on rights "beyond those [constraints] which [were] necessary for confinement alone, [had to] be justified by a compelling necessity."[5] This compelling necessity standard employed by the courts ensured that a pretrial detainee's presumed innocence would not be doubted or overlooked. Recently, however, in *Bell v. Wolfish*, the Supreme Court discarded the compelling necessity standard.[6] By rejecting the "undoubted law,"[7] considered for almost a century as "the foundation of the administration of our criminal law,"[8] the Court provided a judicial precedent that would be used in two 1984 decisions to undercut the ideal of the presumption of innocence. In *Block v. Rutherford*[9] and *Schall v. Martin*,[10] pretrial detainees were clearly excepted from the protection of the presumption of innocence, and are now vulnerable to the discretion of prison officials, to whom courts accord a great deal of deference. This inroad into the principle of the presumption of innocence has led the United States criminal justice system away from the humane and fundamental principles to which it should always adhere.

II. History of the Presumption of Innocence

In *Coffin v. United States*,[11] the United States Supreme Court traced the presumption of innocence to an anecdote of the Emperor Julian that illustrated the Roman philosophy behind this principle. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the custom in criminal cases, the trial was public. Numerius denied guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the

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1. Coffin v. United States, 156 U.S. 432, 453 (1895).
2. *Id.* at 454.
3. Pretrial detainees are "unconvicted individuals awaiting trial, held . . . because they could not post bail." Wolfish v. Levi, 573 F.2d 118, 122 n.6 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).
4. *See* Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975).
5. *Id.*
6. 441 U.S. 520, 532–35 (1979).
7. Coffin v. United States, 156 U.S. 432, 453 (1895).
8. *Id.*
9. 468 U.S. 576 (1984).
10. 467 U.S. 253 (1984).
11. 156 U.S. 432 (1895).

accusation was inevitable, could not restrain himself and exclaimed, "[O]h, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "[I]f it suffices to accuse, what will become of the innocent?"[12]

Mindful of this anecdote, the Court in *Coffin* reiterated that doubt requires acquittal or freedom from the ramifications of a guilty verdict.[13] Therefore, it follows that a pretrial detainee remains within the protective scope of the presumption of innocence until a guilty verdict is rendered at trial.[14] When there is doubt, a cloak of presumed innocence shields and protects those who are vulnerable to legal processes pending a final adjudication.

To illustrate the importance of the presumption of innocence within the early common-law doctrines, the Court in *Coffin* quoted three English scholars whose interpretation and articulation of legal principles lie at the foundation of contemporary jurisprudence. A careful analysis of these quotes demonstrates that the presumption of innocence should be afforded equally to everyone in society.

First, the Court quoted Lord Hale to illustrate that legal systems must be committed to fairness and to the protection of presumed innocence, even if this protection frees those who may be guilty. "In some cases presumptive [evidence goes] far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished[] than one innocent person should die."[15] Lord Hale's words emphasized that regardless of the cost, the preservation of an individual's presumed innocence and dignity should be paramount within humane societies.

Second, the Court in *Coffin* cited Blackstone's Commentaries to further highlight the common-law perceptions of presumed innocence. Blackstone rephrased the principle espoused by Lord Hale, with one notable change. He stated: "[T]he law holds[] that it is better that ten guilty persons escape[] than that one innocent *suffer*."[16] Thus, death does not have to be imminent for the courts to protect the presumption of innocence. Mere suffering by one who may be free from guilt is enough to invoke the harshest scrutiny.

Third, the Court cited *McKinley's Case*[17] in which Lord Gillies noted the pervasive nature of the presumption of innocence.

> I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge . . . . To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty.[18]

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12. *Id.* at 455 (citing A. MARCELLINUS, 1 RERUM GESTARUM, Book 18.

13. 156 U.S. 432, 460 (1895).

14. A pretrial detainee's "traditional right to freedom before conviction permits the unhampered preparation of a defense, and *serves to prevent the infliction of punishment prior to conviction.*" Stack v. Boyle, 342 U.S. 1, 4 (1951) (emphasis added). *But see* 9 WIGMORE, EVIDENCE § 2511 (Chadbourn rev. 1981) (presumption of innocence allocates the burden of proof as a principle of evidence).

15. 156 U.S. 432, 456 (quoting 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN *289).

16. *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES *358) (emphasis added).

17. 33 St. Trials 275 (Scot. H.C.J. 1817).

18. 156 U.S. 432, 456 (1895) (quoting 33 St. Trials 275, 506).

The early Roman and English law doctrines, then, were committed to the preservation of the presumption of innocence and focused on a "devotion to human liberty and individual rights."[19] In many areas of the law, the United States judicial system has left this fundamental presumption intact.[20] Although courts fought to preserve the vitality of the presumption of innocence for pretrial detainees until the 1970s,[21] recent judicial decisions have stripped pretrial detainees of this fundamental right.[22] Without the presumption of innocence, courts fail to protect the valuable rights of detained suspects prior to any adjudication of their guilt.

III. The Presumption of Innocence for Detainees Prior to *Bell v. Wolfish*

Prior to *Bell v. Wolfish*,[23] the judiciary demonstrated a commitment to the rights of pretrial detainees by strictly adhering to the presumption of innocence. This policy offered little deference to prison administrators in handling detainees. To be legitimate, restrictions on detainee's rights had to be justified by a compelling necessity.

The frequently cited case *Detainees of the Brooklyn House of Detention For Men v. Malcolm*[24] applies the stringent compelling necessity test. In *Malcolm*, two consolidated civil rights actions were brought before the United States District Court for the Eastern District of New York by the inmates of the Brooklyn and Queens Houses of Detention.[25] The inmates alleged that inhumane and unsanitary living conditions and administrative practices at the two facilities were unconstitutional.[26] Particularly at issue were the practices of "double-celling"[27] and "excessive confinement of detainees in their 5' x 8' cells each day."[28] The district court enjoined the confinement of two detainees in a single-occupancy cell, and the defendants appealed.[29] The Court of Appeals for the Second Circuit affirmed,[30] specifically delineating the compelling necessity test.[31] According to this test, prison officials must demonstrate that regulations depriving detainees of certain rights are premised on a compelling necessity to secure prison safety. The court reasoned that pretrial detainees, because of the presumption of innocence, had the same rights as bailees and other ordinary citizens. The only restrictions on these rights that might be

19. *Id.* at 460.

20. *See* Stack v. Boyle, 342 U.S. 1 (1951) (right to bail must be preserved prior to conviction if the presumption of innocence is to be preserved); Agnew v. United States, 165 U.S. 36 (1897) (prosecution has burden of proving defendant's guilt in a criminal case and overcoming the presumption of innocence).

21. *See infra* notes 24–39 and accompanying text.

22. *See infra* notes 82–98 and accompanying text.

23. 441 U.S. 520 (1979).

24. 520 F.2d 392 (2d Cir. 1975).

25. *Id.* at 392–93.

26. *Id.* at 393.

27. "Double-celling" means putting two inmates in a single-occupancy cell.

28. 520 F.2d 392, 394 (2d Cir. 1975).

29. *Id.* at 393.

30. *Id.* at 399.

31. *Id.* at 397.

tolerated were those necessary to assure the detainee's presence at trial and to assure prison security.[32]

In determining what constituted a compelling necessity, courts were protective of individual rights and sought to invoke sympathetic policies favoring detainees. For instance, in *Marcera v. Chinlund*,[33] the Second Circuit Court of Appeals held that neither administrative inconvenience nor economic constraints were compelling necessities that would allow prison administrators to restrict detainees' rights.

> [I]t is unconstitutional to deny inmates regular contact visits while they are incarcerated awaiting trial. This right is founded on the bedrock of our criminal jurisprudence: an individual accused of a crime is presumed innocent, and may not be punished, until a jury finds him guilty beyond a reasonable doubt.[34]

Thus, the presumption of innocence was considered an aspect of detainees' constitutional rights.

In *Inmates of Milwaukee County Jail v. Petersen*,[35] pretrial detainees of the Milwaukee County Jail sought to challenge the constitutionality of the jail's "practices and conditions."[36] Specifically at issue were four aspects of the prison environment: disciplinary procedures, limitations and censorship of incoming and outgoing mail, regulation of reading material, and telephone usage restrictions.[37] The court held that the detainees' rights were being violated, stating that the "policies and procedures presently in effect at the Milwaukee County jail offend the first and fourteenth amendments to the United States Constitution. . . ."[38] The Court emphasized these reasons for the extensive judicial protection afforded to those charged with offenses and merely awaiting trial:

> First, the issues presented in this case concern the fundamental rights of true pretrial detainees only. It must be borne in mind that these are not people who have been convicted and sentenced to jail; they are persons who have been charged with offenses and are entitled to the presumption of innocence. They are incarcerated solely because of their inability to post bail.
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> Second, as individuals who have not been convicted of [a] crime, they retain all rights retained by arrestees who have been released on bail, except for the curtailment of mobility deemed necessary . . . to protect the security of the institution in which they are detained.[39]

In *Petersen*, the compelling necessity test was the accepted standard for upholding the presumption of innocence, and the court compared detainees with bailees who were merely awaiting trial without any restrictions on their mobility.

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32. *Id.*

33. 595 F.2d 1231 (2d Cir. 1979), *vacated sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979).

34. *Id.* at 1237 (quoting Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979) and Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975)) (brackets in original).

35. 353 F. Supp. 1157 (E.D. Wis. 1973).

36. *Id.* at 1159.

37. *Id.*

38. *Id.* at 1169; *see also* Tyrrell v. Taylor, 394 F. Supp. 9, 19 (E.D. Pa. 1975), *modified sub nom.* United States *ex rel.* Tyrrell v. Speaker, 535 F.2d 823 (3d Cir. 1976).

39. 353 F. Supp. 1157, 1159–60 (E.D. Wis. 1973).

Malcolm, *Marcera*, and *Petersen* were consistent with the early Roman and common-law doctrines. These cases demonstrated a commitment to the principle of the presumption of innocence by protecting the rights of pretrial detainees against all unnecessary restrictions.

Jones v. Diamond[40] represented an important turning point in the law as it applied to pretrial detainees. In *Diamond*, the inmates of the Jackson County Jail alleged thirteen violations of their constitutional rights: "right to recreation, overcrowding, right to adequate medical care, visitation, utilization of trusties, racial segregation, right to an adequate diet, right to uncensored communication, right to fair disciplinary proceedings, a proper classification system, right to protection (inmate security), physical facilities, and right to access to the courts."[41] Exhibiting great deference to prison officials, the Fifth Circuit Court of Appeals held that the "evidence did not establish that [the] Jackson County, Mississippi jail was unfit for human habitation . . . ."[42]

Diamond limited the scope of the presumption of innocence as it applied to pretrial detainees. Instead of focusing on the absence of a conviction, *Diamond* focused on the probable guilt of detainees, and thus, the need for judicial deference to prison officials who represent the governmental interest and who protect the public at large. Specifically, the court stated, "Pretrial detainees have not yet been convicted of any offense and are accorded the presumption of innocence when brought to trial, but the fact remains that they are being held on probable cause to believe that they are, in fact, guilty of a violation of the criminal statutes."[43] This restrictive application of the doctrine established the groundwork for *Bell v. Wolfish*[44] and encouraged a judicial tolerance for prison actions premised on probable guilt rather than on presumed innocence.

IV. *Bell v. Wolfish*

In *Bell* v. *Wolfish*[45] the United States Supreme Court abolished the compelling necessity test as it applied to pretrial detainees. *Wolfish* concerned allegedly unconstitutional conditions in Manhattan's pretrial detention facility known as the Metropolitan Correctional Center (MCC).[46] Even though MCC was acclaimed as the "best and most progressive"[47] detention facility, the Second Circuit Court of Appeals held that its "double-bunking" procedure was unconstitutional because no

40. 594 F.2d 997 (5th Cir. 1979).

41. *Id.* at 1005–06. A definition of "trusties" can be found *id.* at 1020–21 n. 22.

42. *Id.* at 997.

43. *Id.* at 1003–04. For other instances of judicial deference to prison officials, see Procunier v. Martinez, 416 U.S. 396 (1974) and Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (restrictions on first amendment rights imposed by prison officials on inmates to be analyzed in light of the goals of the correctional system); Meachum v. Fano, 427 U.S. 215 (1976) (Court held that no hearing is required before an inmate is transferred to another institution with inferior conditions); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125 (1977) (courts must recognize the restrictive and unique circumstances of prison environment and give appropriate deference to decisions of officials).

44. 441 U.S. 520 (1979).

45. *Id.* at 524.

46. *Id.* at 523.

47. *Id.* at 525 (citing Wolfish v. Levi, 573 F.2d 118, 121 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979)).

compelling state interest could justify subjecting presumptively innocent detainees to this inhumane treatment.[48] The Supreme Court reversed, limiting the presumption of innocence to a burden of proof doctrine at trial.[49] The Court focused not on innocence but on the question whether the prison conditions constituted punishment, reasoning that due process requires only that detainees be free from punishment.[50] The Court stressed the policy advantages of judicial deference to prison officials who are seeking to achieve reasonable and legitimate goals.[51]

Wolfish provided a rare opportunity for the Court to support the presumption of innocence doctrine, with the compelling necessity test, or to develop a new standard for addressing the unique problems confronting pretrial detainees. The Court chose the latter. Three important aspects of the decision highlight the fundamental changes in the long-established doctrine of the presumption of innocence and the compelling necessity test, as it was applied previously to pretrial detainees.[52]

First, the Court rejected any notion that the presumption of innocence doctrine required that the compelling necessity test be applied, as a lower court held earlier in *Inmates of Milwaukee County Jail v. Petersen*.[53] By separating the two doctrines, the Court could then proceed to redefine and restructure their application in pretrial detainee settings. The Court stated:

> Our fundamental disagreement with the Court of Appeals is that we fail to find a source in the Constitution for its compelling-necessity standard. Both the Court of Appeals and the District Court seem to have relied on the "presumption of innocence" as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity. But the presumption of innocence provides no support for such a rule.[54]

Thus, the Court effectively overruled the Second Circuit *Malcolm* case, which strongly advocated the stringent compelling necessity test.

Second, the Court, now treating the presumption of innocence as a separate doctrine, applied it differently within the pretrial detainee context.[55] Although noting the importance of the presumption within the legal system, the Court attempted to reconcile this with the inequitable treatment of detainees by stressing the special circumstances of their confinement, which purportedly exempted them from the

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48. Wolfish v. Levi, 573 F.2d 118, 126 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

49. Bell v. Wolfish, 441 U.S. 520, 533 (1979).

50. *Id.* at 535.

51. *Id.* at 538–39.

52. *See* Comment, *The Constitutional Right of Pretrial Detainees: A Healthy Sense of Realism?*, 41 OHIO ST. L.J. 1087, 1098–99 (1980).

53. 353 F. Supp. 1157 (E.D. Wis. 1973); *see supra* notes 24–32 and accompanying text.

54. Bell v. Wolfish, 441 U.S. 520, 532 (1979) (footnote omitted). *But see id.* at 569–70 (Marshall, J., dissenting) (proposing an inquiry into whether the government interest outweighed the individual deprivation suffered. Marshall believed his analysis to be more consistent with due process requirements).

55. *See* Note, *Constitutional Law—Criminal Law—Pretrial Detainees May Be Subjected to Conditions of Confinement Reasonably Related to Legitimate Government Objectives*—Bell v. Wolfish, 1979 B.Y.U. L. REV. 1022, 1027–33. The Note provides a valuable analysis of the Court's movement from a compelling necessity standard of review in detainee cases toward a review based on the necessity of showing only a reasonable relationship between the restrictive prison condition imposed and the government interest at stake.

blanket application of the presumption of innocence within more general areas of the law.

> Without question, the presumption of innocence plays an important role in our criminal justice system. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.[56]

The Court in *Wolfish* attempted to satisfy those critical of the decision by reaffirming the principles enunciated in *Coffin v. United States*.[57] The majority emphasized that the presumption of innocence is a basic principle of the law, but the Court did not apply it equally to all citizens.[58] *Wolfish* abandoned, in one rapid stroke, the presumption of innocence after *Coffin*, *Petersen*,[59] *Marcera*,[60] and *Malcolm*[61] had established precedents which were followed for decades to insure the purity and consistent application of the doctrine.

The third important aspect of the *Wolfish* decision was its reformulation of the test used for evaluating prison action. The Court shifted from a compelling necessity standard to a reasonableness standard for evaluating prison officials' actions. The Court held that restrictions on pretrial detainees could not constitute punishment. This was explained as follows:

> The factors identified . . . provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word. A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of the detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."[62]

Thus, the test applied by the Court to assess the constitutionality of prison actions that restrict detainees' rights focused on reasonableness, rational objectives, and legitimacy.

The Court justified this policy of increased deference to prison officials with concepts of prison official expertise, separation of powers, and judicial ignorance of prison concerns. The extent of this deference was emphasized by the Court when the majority stated:

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56. Bell v. Wolfish, 441 U.S. 520, 533 (1979) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

57. 156 U.S. 432 (1895).

58. *See* Comment, *Constitutional Law—Pretrial Detention—Due Process*—Bell v. Wolfish, 26 N.Y.L. SCH. L. REV. 341, 354–55 (1981).

59. 353 F. Supp. 1157 (E.D. Wis. 1973).

60. 595 F.2d 1231 (2d Cir. 1979), *vacated sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979).

61. 520 F.2d 392 (2d Cir. 1975).

62. Bell v. Wolfish, 441 U.S. 520, 538 (1979) (footnote omitted) (brackets in original) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)); *see also* Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1033–37 (1982).

> Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan.[63]

After *Wolfish*, it is questionable when, if ever, courts will have the power to examine prison action that may be violative of detainees' constitutional rights.[64] Also, it is doubtful whether the judiciary will ever return to the Roman-inspired ideal of presumed innocence that *Coffin* invoked to protect everyone equally.[65]

V. The Presumption of Innocence Following *Bell v. Wolfish*

It is important to note the new standards applied by courts in pretrial detainee cases after *Wolfish*. The remainder of this Note will examine decisions adhering to *Wolfish*, those deviating from it in an attempt to favor prisoners, and later Supreme Court decisions which reflect the new standard of judicial deference to the expertise of prison officials. Additionally, this Note will seek to propose solutions which address and remedy the *Wolfish* disregard for traditional notions of presumption of innocence.

The most noticeable change in the decisions that followed *Wolfish* was the application of a new judicial deference to prison officials by the lower courts. Two cases illustrate this point.

In *Sistrunk v. Lyons*,[66] the plaintiff alleged that his excessive bail "abridged the presumption of innocence."[67] The Court of Appeals for the Third Circuit referred to *Wolfish* in denying Sistrunk habeas corpus relief.

> In the wake of *Bell v. Wolfish*, it would appear that pretrial detainees can no longer predicate constitutional challenges on the presumption of innocence. . . . [T]he Court stated that despite the important role the presumption of innocence plays in the criminal justice system, "it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[68]

Thus, the court in *Lyons* explicitly recognized the *Wolfish* premise that pretrial detainees are not entitled to the presumption of innocence. Without challenging the Supreme Court's disregard for the treasured ideal of innocence, the *Lyons* decision illustrated that any hope of returning to fundamental notions of humanity and dignity within the pretrial detainee context may indeed be futile.[69]

The second case that illustrated the new judicial deference given to prison officials was *Rutherford v. Pitchess*.[70] In *Rutherford*, inmates of the Los Angeles Jail challenged practices and procedures concerning, among other things, contact visits and cell

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63. Bell v. Wolfish, 441 U.S. 520, 562 (1979).
64. *See* Comment, *supra* note 52, at 1110–11.
65. *Id.* at 1104.
66. 646 F.2d 64 (3d Cir. 1981).
67. *Id.* at 71.
68. *Id.* at 71 (quoting Bell v. Wolfish, 441 U.S. 520, 533 (1979)).
69. *See also The Supreme Court, 1978 Term*, 93 Harv. L. Rev. 60, 105 (1979).
70. 710 F.2d 572 (9th Cir. 1983), *rev'd sub nom.* Block v. Rutherford, 468 U.S. 576 (1984).

searches.[71] The Court of Appeals for the Ninth Circuit affirmed the lower court decision in part when it "allowed low-risk detainees to have one contact visit per week"[72] and to witness cell searches.[73] This decision cited *Wolfish* for the proposition that "authority to make policy choices concerning prisons is not a proper judicial function."[74] *Rutherford* emphasized the separation of powers and judicial deference doctrines outlined in *Wolfish*, and limited its scope of review based on these doctrines.

Nonetheless, *Rutherford* did offer some hope for pretrial detainees. After stating a principle of deference to prison officials, the court in *Rutherford* adhered to a balancing test in pretrial detainee cases.[75] Although the Court in *Wolfish* purported to examine prison officials' actions by employing a reasonableness test, in reality its decision reflected little concern for detainees' rights. Instead, judicial deference to prison authorities seemed paramount. Nonetheless, the Ninth Circuit attempted to examine the validity of prison officials' actions in relation to detainee rights, rather than in relation to allegedly legitimate prison concerns. Although the court stated that it was upholding the mandates of *Wolfish*, it appeared to shift the focus back to the detainees' rights, which were not truly considered in *Wolfish*.

> A court confronted with challenges to prison practices therefore faces an important and difficult task. To fulfill the Supreme Court's mandate under *Wolfish*, it must explore and analyze . . . competing sets of needs and objectives—the penal institution's interest in institutional administration and security and the detainee's interest in protecting and exercising his retained constitutional rights. Only after such a *thorough* review can a court decide whether or not a particular prison condition is an unreasonable, exaggerated response to the legitimate nonpunitive objectives of a detention facility.[76]

Because the court in *Rutherford* emphasized thorough judicial review of prison practices, it apparently departed from the *Wolfish* mandate which advocated a "hands-off" attitude toward prison authority. Additionally, the court challenged actions that restricted detainees' rights by applying strict scrutiny to test their constitutionality. However, this retreat from *Wolfish* was rejected one year later by the Supreme Court when it reversed the *Rutherford* decision.[77]

The Supreme Court first returned to the issue of pretrial detainees' rights in *Hewitt v. Helms*,[78] when the Court, as in *Wolfish*, clearly approved the principle of judicial deference to prison officials, saying "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security,"[79] and, "We have repeatedly said both that prison officials have broad administrative and discretionary authority over the

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71. *Id.* at 574.
72. *Id.* at 577.
73. *Id.* at 579.
74. *Id.* at 575.
75. *Id.*
76. *Id.* (emphasis added).
77. Block v. Rutherford, 468 U.S. 576 (1984).
78. 459 U.S. 460 (1983).
79. *Id.* at 472 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

institution they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests."[80] The Court in *Hewitt* did not concern itself with the balancing of interests or with a thorough review. Rather, the Supreme Court reaffirmed, five years after *Wolfish*, that judicial deference to the prison authorities who regulate detainees' rights is the paramount concern.

The Supreme Court reversed *Rutherford v. Pitchess*[81] one year after *Hewitt*, in *Block v. Rutherford*.[82] In *Block*, the Court made it clear that the Ninth Circuit's attempt to retreat from the mandates of *Wolfish* was not to be tolerated. The Court reiterated the principle that prison officials are to be "accorded wide-ranging deference" in order to maintain prison security.[83]

When examining the extent of the judicial deference advocated in *Block*, it is disheartening to note that the Court once again entrusted prison officials with the duty of balancing the need for legitimate prison action with detainees' constitutional rights and presumed innocence. The Court appeared to apply *Wolfish* to justify a complete abdication of any duty to protect pretrial detainees from the whims of prison officials. "[P]roper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees."[84]

Two passages from the dissenting opinion illustrate the oppressive nature of the majority opinion. First, the dissent noted:

> Guided by an unwarranted confidence in the good faith and "expertise" of prison administrators and by a pinched conception of the meaning of the Due Process Clauses and the Eighth Amendment, a majority of the Court increasingly appears willing to sanction any prison condition for which they can imagine a colorable rationale, no matter how oppressive or ill justified that condition is in fact.[85]

The dissent emphasized that the expertise of prison officials was questionable, that deference to prison authorities when constitutional rights were at stake was unwarranted, and that the scrutiny of the Court should have been at its highest with the implication of due process concerns. Clearly, the dissent desired to rescue the balancing process from the hands of prison officials and wanted the Court to weigh the factors that determine the validity of prison action.

The second passage in the dissent, which breathed a small breath of life into the presumption of innocence and the compelling necessity test, appeared to advocate a return to the analysis that the district court adhered to in *Inmates of Milwaukee County Jail v. Petersen*:[86]

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80. *Id.* at 467.
81. 710 F.2d 572 (9th Cir. 1983), *rev'd sub nom.* Block v. Rutherford, 468 U.S. 576 (1984).
82. 468 U.S. 576 (1984), *rev'g* Rutherford v. Pitchess, 710 F.2d 572 (9th Cir. 1983).
83. *Id.* at _____, 104 S. Ct. at 3232 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).
84. *Id.* at _____, 104 S. Ct. at 3235 (quoting Bell v. Wolfish, 441 U.S. 520, 557 n.38 (1979)).
85. *Id.* at _____, 104 S. Ct. at 3238 (Marshall, J., dissenting).
86. *See supra* notes 35–39 and accompanying text.

> [T]wo factors suggest that only a very important public purpose could sustain the policy. First, even persons lawfully incarcerated after being convicted of crimes retain important constitutional rights; *presumptively innocent* persons surely are entitled to no less. Second, we have previously insisted upon very persuasive justifications for government regulations that significantly, but not prohibitively, interfered with the exercise of familial rights; arguably, a similarly stringent test should control here. . . . At a minimum, petitioners, to prevail, should be required to show that the Jail's policy materially advances a substantial government interest.[87]

The dissent struggled to retain the presumption of innocence for detainees and attempted to bring the balancing operation back into the courts, which might demand a more substantial or compelling governmental objective. Despite this commendable attempt to revive the presumption of innocence and the compelling necessity test set forth in *Malcolm*,[88] the majority in *Block* held that: "[The] petitioners' blanket prohibition is an entirely reasonable, nonpunitive response to the legitimate security concerns identified, consistent with the Fourteenth Amendment."[89]

For those advocates who oppose the Court's stance in *Wolfish*,[90] this decision is yet another blow to the fundamental and humane aspects of the legal system. Clearly, the dissent in *Block* offers hope to those who continue to support the ideals espoused in *Petersen*,[91] *Malcolm*,[92] and *Marcera*;[93] but this hope may indeed be futile.

Another decision premised on the deference doctrine established by *Wolfish* was *Schall v. Martin*.[94] In *Schall*, the Supreme Court addressed the constitutionality of a New York Family Court act that allowed a delinquent accused of committing a crime to be detained upon a finding of serious risk that the child "may before the return date commit an act which if committed by an adult would constitute a crime."[95]

The Court upheld the statute by employing the premise of *Wolfish* that encourages judicial deference: "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[96] The Court did appear, however, to emphasize that complete deference is not mandated by *Wolfish*. Indeed, the majority appeared to be balancing the merits of the New York Family Court act on its own, without turning to the prison authorities' unfettered discretion. Nonetheless, it must be noted that neither the presumption of innocence nor the compelling necessity test was ever alluded to within the opinion. In *Schall*, unlike in *Block*,[97] the presumption of innocence yielded not only to an inference of past guilt, but also to the possibility of future guilt. Clearly, this extension of judicial deference to state prison systems renders constitutional protec-

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87. 468 U.S. 762, _____, 104 S. Ct. 3227, 3240 (1984) (Marshall, J., dissenting) (footnotes omitted) (emphasis added).

88. 520 F.2d 392, 397 (2d Cir. 1975); *see supra* notes 24–32 and accompanying text.

89. 468 U.S. 762, _____, 104 S. Ct. 3227, 3234 (1984).

90. 441 U.S. 520 (1979).

91. Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (E.D. Wis. 1973).

92. Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975).

93. Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979), *vacated sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979).

94. 467 U.S. 253 (1984).

95. *Id.* at 255 (quoting N.Y. FAM. CT. ACT. § 320.5(3)(b) (McKinney 1983)).

96. *Id.* at 269 (quoting Bell v. Wolfish, 441 U.S. 520, 538 (1979)).

97. Block v. Rutherford, 468 U.S. 576 (1984).

tions useless to those individuals who look to the powerful few who control detention centers, when seeking redress for rights grievances.

Once again, the weary advocate of the presumption of innocence and the compelling necessity test found shelter within the dissent. Although representing the views of a minority of the Court, the dissenting opinion again offered some hope for those with an eye toward the future:

> Only in occasional cases does incarceration of a juvenile pending his trial serve to prevent a crime of violence and thereby significantly promote the public interest. Such an infrequent and haphazard gain is insufficient to justify curtailment of the liberty interests of all the presumptively innocent juveniles who would have obeyed the law pending their trials had they been given the chance.[98]

In both *Schall* and *Block* then, the *Wolfish* rationale prevails. The doctrine of judicial deference to prison administration expertise continues to guide the Court in a manner that ignores the traditional value of presumed innocence. Those individuals who choose to protect the liberty interests of pretrial detainees must resort to the arguments proposed by the dissenting minority of the Supreme Court in *Block* and *Schall*.

VI. CONCLUSION

The Roman-inspired principle of the presumption of innocence and the compelling necessity test of *Malcolm*[99] no longer receive judicial cognizance after *Wolfish*.[100] The Court instead advocates a policy of deference to prison officials even at the cost of undermining precious constitutional rights. The United States allegedly seeks to uphold and adhere to judicial philosophies that ensure the preservation of individual rights. Indeed, the United States' international reputation is built on a foundation that supports and protects an individual's right to a presumption of innocence before conviction, and which protects an individual who might otherwise succumb to unconstitutional regulatory schemes. Yet by abandoning the compelling necessity test previously required to justify prison officials' actions restricting detainees' constitutional rights, the Court belies this reputation in the area of pretrial detainment. Prison officials cannot be trusted to protect individual rights. The Court must retrieve the discretion it so easily surrendered to prison administrators in *Wolfish*. Until the Court uses its power to protect the individual rights of pretrial detainees, however, those who adhere to the fundamental doctrines of Blackstone, Lord Hale, and Lord Gillies must look to the dissenting few on the Supreme Court. May the search for a judicial perspective premised on the humane and fundamental legal values of the past not always appear so fruitless.

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98. 467 U.S. 297–98 (1984) (Marshall, J., dissenting) (footnotes omitted).
99. Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F. 2d 392 (2d Cir. 1975).
100. Bell v. Wolfish, 441 U.S. 520 (1979).